DOCUMENT RESUME

ED 451 644 EC 308 326

AUTHOR Beekman, Lyn
TITLE Mediation Plus Options To Resolve the "Real" Problems Underlying Disputes.
PUB DATE 2000-00-00
NOTE 44p.
PUB TYPE Guides - Non-Classroom (055)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Arbitration; *Conflict Resolution; *Disabilities; *Due Process; Elementary Secondary Education; Grievance Procedures; Hearings; Minimum Competencies; *Negotiation Agreements; Parent School Relationship; Problem Solving; Special Education; Staff Role
IDENTIFIERS *Mediation

ABSTRACT

This paper discusses alternatives to court litigation in special education disputes between schools and parents of students with disabilities. It begins by describing problems with the current hearing process and dispelling myths about alternative dispute resolutions (ADR). The advantages and disadvantages of mediation are then outlined, along with the actual mediation process. Reasons why parties refuse to utilize mediation are also addressed. Practical things to consider in mediation are listed and include: (1) consider the mediator's personality, the mediator's knowledge of the law and practice of special education, and the mediator's work experience; (2) keep the pressure on by having the hearing ready to be scheduled within a couple of weeks; (3) be sure that enough time is set aside to conduct the mediation; (4) prepare for mediation by doing some self-assessment and analyzing underlying problems; (5) consider who should participate; and (6) consider what the agreement should cover. Factors to consider before pursing nontraditional dispute resolution options are provided, along with a description of other ADR options such as facilitation, conciliation, and neutral educational evaluation. Attachments include sample agreements for a relations consultant, a trial placement, a neutral third party, mediation, and a less formal hearing process. (CR)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 451 644

SPECIAL EDUCATION SOLUTIONS, LLC

MEDIATION PLUS OPTIONS TO RESOLVE THE "REAL" PROBLEMS UNDERLYING DISPUTES

BY

LYN BEEKMAN

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY

Beekman

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)"

1

EC 308326

BEST COPY AVAILABLE

special education solutions, L.L.C.

2139 COMMONS PARKWAY ♦ OKEMOS, MICHIGAN 48864-3987 ♦ TELEPHONE (517) 381-8909 ♦ FAX (517) 381-8086
e-mail: spedsolutions@msn.com

LYNWOOD "LYN" E. BEEKMAN

INDEPENDENT SERVICE PROVIDER
EDWARD L. BIRCH

SPECIALISTS IN SERVICES TO HELP PEOPLE MOVE FORWARD
MEDIATION ♦ HEARING OFFICER ♦ COMPLAINT INVESTIGATION
♦ TRAININGS AND PRESENTATIONS

MEDIATION PLUS OPTIONS TO RESOLVE THE "REAL" PROBLEMS UNDERLYING DISPUTES

Lyn Beekman
Special Education Solutions
Okemos, MI

I. INTRODUCTION.

A. Let's not forget that parents and the staff of districts each year conduct hundreds, and in some districts thousands, of IEP meetings each year. Most result in plans cooperatively developed with few, if any, problems and no request for a hearing. Further, many of those where a request for hearing is made are quickly resolved through further discussion, mediation, or otherwise.

B. Since IDEA due process procedures were developed approximately 20 years ago, much has changed for many parents and many districts. Probably no one envisioned the "baggage" which today parents and districts bring into IEP meetings and sometimes into a hearing. The IEP meeting, designed to be a collaborative, cooperative effort by parents and district staff in partnership sometimes turns into a "battle" in what can lead to an almost never ending "war."

C. Increasingly, a very few parents are finding the IEP meeting process does not meet their needs and/or those of their child. They may not trust the district (sometimes with very good cause), they may not like the district (again, sometimes understandably), they may just love the "fight," they may lack an advocate/attorney knowledgeable in special education, they may have their own emotional or other problems which may not allow them to act reasonably or fulfill their parenting role and responsibilities. Sometimes, the district may not know what to do or how to do it and/or the parent does or believe he/she does.

D. Regrettably, more and more districts are finding the requirements under IDEA too onerous procedurally, financially, and otherwise. The attitude and/or actions of district staff caused by a variety of problems and pressures in today's school

© 2000 Special Education Solutions, 2139 Commons Parkway, Okemos, MI 48864-3987; Telephone: 517-381-8909; Fax: 517-381-8086; E-mail: spedsolutions@msn.com.

EC 308316

environment create situations where the needs of the child (and sometimes the parent) are not being met, or at least such is the clear perception of the parents. Sometimes, districts also seem to like the "fight," "hate" the parent, they too can lack an attorney knowledgeable in special education, have their own emotional or other problems, or may not be able to fulfill their administrative/teaching/related service role due to lack of objectivity, knowledge, skill, etc.

E. The Individuals with Disabilities Education Act (IDEA) and its regulations are "dual advocacy" laws, i.e., both parents and district staff have the right/responsibility to be a student advocate. Regrettably, there is often too much emphasize on "rights" by both parties and not enough on what is right for the student and an appropriate resolution of a dispute. As G.K. Chesterton said: "To have a right to do a thing is not at all the same as to be right in doing it."

II. HOW ABOUT THE HEARING PROCESS?

A. Most of the time, even if a party wins, they don't really win! Several studies have shown that it is rare when a special education due process hearing decision actually is accepted and resolves disputes between parties. These studies reflect that the lengthy preparation for a hearing, the attendant anxiety, the win/lose atmosphere, the high cost, and the wait for a decision, too often operate to increase alienation and sustain antagonism, particularly for the parent. In short, it has been found that after the hearing ends, usually the parents and the school tend to resume their conflict. See, e.g., Budoff and Orenstein, Due Process and Special Education: On Going to a Hearing, Brookline Books (1982).

B. Some hearing officers are not well trained, are not knowledgeable about (or have a "feel" for) special education, or even biased. On appeals, courts see few special education cases, know little, if anything, about special education and generally don't like such cases. Under these circumstances the decision may not be very helpful to either party--or most importantly the student. Plus, parents particularly, despite the Attorney's Fees Act, still often have tremendous problems obtaining an advocate/attorney.

C. Usually, hearings involve a tremendous cost to a district. When one considers the district's attorney's fees, the hearing officer's fees, the related costs of experts and substitutes, not to mention the indirect cost of lost time/emotion/energy expended by administrative, teaching, and other staff prior to and during the hearing, the "cost" is probably greater than most parents realize. And, while the out-of-pocket costs to parents of attorney's fees and related costs (should they not be deemed a prevailing party) may be less, so are their resources, and they also incur substantial lost time/emotion/energy prior to and during the hearing, as well as lost work place time and/or benefits.

These costs in varying situations result in parents and districts using the hearing as a threat or extortion to get what they want. Each party must ask whether the "cost" of a

hearing is worth it and the answer to that question must lie in what they want to get out of the hearing process. Do they want a legal answer to what might appear on its face to be a simple question, i.e., what is the appropriate program? Or do they want the answer to that question and more, e.g., a way to work with the other party in partnership?

Unlike the parties in most matters which are the subject of litigation in the courts, the parties in a special education dispute must continue to "live" and "work" together after the IEP meeting, mediation, or hearing to educate the student. It is a forced "marriage" (unless the parent moves). Accordingly, the mediation and hearing processes, in addition to providing a resolution to the dispute, should also, if at all possible, attempt to establish a post-proceeding framework for the parties to work together as partners and provide a "therapeutic" outlet as well. Rarely do they do so.

It often helps for an advocate/attorney to set forth in a letter to a parent/district client the options they have and the advantages and disadvantages to each, both short-term and long-term, including costs of all kinds, the relationship, educational "peace," etc.

III. ADR MYTHS.

A. The use of alternative dispute resolutions (ADR), notably mediation, has been widespread in many areas for years, e.g., employment, community disputes, divorce, etc. But, mediation, and especially other ADRs, have been slow to catch on in special education. In fact, prior to IDEA-97 and its regulations, mediation was not mentioned in IDEA except for a brief note after 34 CFR 300.506 regarding hearings. Are parents and districts too obsessed with regard to their respective rights/responsibilities under IDEA? Are OSEP and state departments too compulsive about meeting 45-day deadlines and other procedures that they forget the goal of educating a student in partnership? Are the disputes just too emotional or is it something else?

B. Finally, mediation and other ADRs are now being more frequently considered. Why? The provisions of IDEA-97 (to be discussed below) certainly help. But hearings/complaints have gone wild in terms of their number in a few places, but even more so generally regarding their time, intensity, issues, and other legal entanglements. Everyone, parents, and district staff are getting tired and frustrated.

C. **Four myths about ADR that must be dispelled:**

1. Mediation only follows a request for hearing: No. The time to consider an ADR is not just after a parent (or district) has requested a hearing/filed a complaint. It should be considered at any time a significant dispute arises in the evaluation/IEP/hearing/complaint process.

2. Mediation is the only ADR: Not true. There are many others and combinations of them which might be appropriate in differing situations (which will be discussed more in detail later on). In short, suggesting/agreeing upon a particular ADR option at the outset can be critical.

3. Only special education issues can be mediated: Anything can be subjected to mediation/an ADR if the parties want to, e.g., disputes concerning pure discipline, records, sports, staff, etc., etc. (non-special education mediation wouldn't be IDEA funded!).

4. Someone has to "give more" in mediations/ADR: Not necessarily so. The resolution often can be a different way that meets the student's needs and the concerns of both parties, e.g., one to one paraprofessional vs. needs/responsibilities, consultive therapies vs. direct, BIP in IEP, etc.

IV. MEDIATION.

A. Clearly, it's the most traditional ADR option. It's an informal, confidential process in which persons having a dispute, with the help of a trained neutral person, try to find a mutually agreeable solution to their dispute. The neutral does not decide the dispute. It's voluntary with neither party waiving any right.

Under IDEA-97 and the new regulations, each state and district must establish procedures that allow disputes to be resolved through mediation. It cannot be used deny or delay a hearing. The mediator must be "qualified," i.e., trained in mediation techniques and special education law. The mediator cannot be an employee of a district or state agency, nor an employee of an SEA providing direct services to a child who is the subject of the mediation. The mediator must not have a personal/professional conflict of interest (which will not arise solely because of being paid by the district/state).

The state must maintain a list of qualified mediators. If a mediator is not selected from the list on a random/rotational basis, the parties must agree on the mediator.

Either the state or a district may establish a procedure to require parents who refuse to use mediation to meet at a time and a place convenient to the parents with a "disinterested party" (from a parent training/information center, community parent resource center, etc.). The purpose of the meeting would be to encourage the use of mediation and explain its benefits. The cost of mediation and these meetings is to be paid by the state.

Mediation sessions must be timely scheduled and held in a convenient location. An agreement reached in mediation must be set forth in a written agreement. Mediation discussions are confidential, can't be used in any due process hearings/court actions and parties may be required to sign a confidentiality pledge. A state may opt to allow

parents to file claims for attorney's fees for mediation requests filed prior to a request for hearing. 20 USC 1415(e); §300.506.

The Analysis to the new regs notes: "(1) mediation should also be used to attempt to resolve complaints as well as hearings; (2) mediator qualifications are more stringent than hearing officers to ensure mediation is a more attractive option, e.g., no district employees; (3) a single mediator (rather than a panel or co-mediation) is required "for clear communication and accountability;" (4) specific techniques, e.g., utilization of telephone conferences, is up to the mediator's independent judgment/expertise; (5) the enforceability of mediation agreements is dependent upon state/federal law; (6) the confidentiality requirement does not diminish a parent's right to obtain records under FERPA or either party's right to obtain information that would otherwise be subject to discovery; and (7) a hearing officer should not extend the 45-day deadline due to pending mediation unless both parties agree (and the same being true with regard to the investigator on the 60-day time deadline concerning a complaint). *See* Analysis at pp. 12611-12612.

V. THE ADVANTAGES AND DISADVANTAGES OF MEDIATION.

A. Advantages: There are many, but to name a few: the parties control the resolution of their dispute–not a hearing officer/court (and thereby ownerships in it/compliance with it more likely); it presents an opportunity for a "win-win" result and to maintain/enhance/create a cooperative partnership relationship; all relevant/ negotiable concerns/issues can be discussed not just "legal" matters; its confidential; and, it avoids a complaint/hearing which may be costly in terms of both money and relationship.

While all of the above could and should occur at an IEP meeting, sometimes it doesn't for a variety of reasons including the lack of a neutral, obsession with the IEP form, the atmosphere otherwise, the lack of available information/understanding of that information/options, etc.

B. Disadvantages. Some of the disadvantages are: There is not guarantee of an end to the dispute (although a process might be identified which would lead to a resolution); there is no way to force the other party to mediate; it can be abused, e.g., used for discovery; and, time and money may be lost if the effort is unsuccessful.

C. Disputes in special education should be a good "candidate" to be resolved by mediation (or other ADR options) because education is not exact, there often being many approaches and options; the parent/district partnership/relationship will be continuing; and, the potential negatives of pursuing a hearing are many and significant, e.g., "losing," expensive, lengthy, acrimonious, etc.

VI. THE ACTUAL MEDIATION PROCESS.

A. Typically a parent and district would agree to go to mediation and ask that a mediator be chosen from the list or agree upon one. Sometimes a parent or district might contact a mediation center indicating their willingness and have the center contact the other party regarding their willingness to participate. An agreeable time and location is arranged (although a conference call between the parties can also be held if desired/appropriate re: establishing the time and location, participants, prior information to be exchanged, issues, etc.).

B. At the mediation, which is informal, typically the mediator makes an opening statement. Each side is then given an opportunity to present its view of the dispute. Thereafter the mediator may lead a joint discussion and/or separate the parties, speaking with them independently, for as long as the mediator and the parties believe progress on an agreement is being made. If agreement is reached, it is written down and signed.

C. This presenter believes the traditional approach to mediation should be modified for special ed disputes in three ways. First, traditional mediators do not believe they need to know much of anything about the subject. To be effective with regard to the special education area, this presenter believes the mediator needs both an understanding of the law, but also the "practice" and practicalities of how the evaluation/IEP and hearing processes really work (or don't work). IDEA-97 requires a knowledge of the law, but a little more is even better.

Second, in traditional mediation, the opening statements of each party are usually limited in time nor is any interruption allowed. Given in special education the parties have typically discussed issues for hours before, during, and after an IEP meeting, this presenter believes the mediator should be more directive, i.e., focusing discussion from the outset on the issues, namely the needs of the students and how to address them rather than history, alleged wrongs, etc.

Third, traditional mediators (although it depends on style) usually prefer to be more passive and subtle with regard to suggesting possible new options/approaches or opinions. This presenter believes in the special education arena both parents and districts are often starving and welcome new options/ideas and if done appropriately, candid assessments of the strengths/weaknesses of their "case."

VII. PARTIES REFUSING TO UTILIZE MEDIATION.

A. While generalizations are dangerous, it appears most parents are willing to try it. Interestingly, IDEA-97's option of requiring parents to meet with third parties is apparently being utilized rarely even when parents do refuse.

B. District refusals seem more plentiful for a variety of reasons. Some think mediation is arbitration, i.e., a decision will be made. Others say they "having nothing more to

give" and/or the parent is unwilling to "move." Others want to "get it over with!" Still others say if it could be settled, it would have and should have given all the discussions we've had. Finally, some say it's a "legal" issue that must be decided by a hearing officer.

C. The advantages/disadvantages have already been noted. With rare exception, most of the above excuses are lousy.

VIII. PRACTICAL THINGS TO CONSIDER IN MEDIATION.

A. The mediator–If you can, consider the mediator's personality (e.g., active/passive, facilitative/evaluative, etc.), the mediator's knowledge of the law and the practice of special education, and finally the mediator's work experience, e.g., parent of a student with a disability, district staff, hearing officer, professor, etc.). Weigh how these factors fit into to what you hope to achieve through the mediation (e.g., focus more on legal issues than non-legal issues) and the mediator's receptivity to the style and tactics you want to pursue in achieving those goals (e.g., legal arguments, practical educational approaches, etc.). Bottom line, try to get a mediator who fits your particular situation.

B. What should you do with the pending hearing/complaint?–Sometimes limiting the time to conduct a mediation and keeping the pressure on is good and at other times it's bad. Generally, if the mediation can be conducted without undue delay, while still having the hearing "ready to be scheduled or go within a couple of weeks" is best. Bottom line, keep the pressure on the parties, but not so much that they're wrapped up in hearing preparation both psychologically and time wise.

C. Be sure that enough time to set aside to conduct the mediation, i.e., typically a day or the better part of the day. While initially it may not seem it should take that long, it might and once "the ball gets rolling," you really don't want to take a break and reconvene due solely to time constraints.

D. Preparation for mediation–Now that we're headed to mediation, what are the concerns/needs/issues that we'd like to discuss? Do some self-assessment, internally or externally (e.g., where you're at, why you're there, are there other options, and have you explored them). Remember, this is not a hearing or complaint investigation so witnesses and exhibits are not necessary. The focus should be forward, often practical, with an open mind (even if your frustrated, mad, tired of this, etc.).

While the focus should rightfully be upon the student–don't totally ignore personalities that may be a part of the dispute. What does the district want–and what does the parent want? Consider what the district/parent is willing to do, including even such things as paying some attorney's fees. Consider how one wants to use the mediation process, i.e., to share sensitive information, explore settlement possibilities and/or convince the opposing attorney/party to settle?

Probably the biggest mistake the parties and their attorneys make is not analyzing a dispute situation in an attempt to identify and address not only the disputed issue(s), but the underlying problem(s) as well. In some situations there are no underlying problems. But, consider these common categories of underlying problems (which are not mutually exclusive):

1. The parties never <u>really</u> discuss the situation, e.g., the parent and/or advocate just asked for the hearing or agrees with the IEP and then asks for a hearing, etc. For example, parent asks for IEE, student placed in private school and lines are drawn, district says it doesn't need to provide on ESY or ESD, etc.

2. The parties don't like/trust/have no confidence in each other, i.e., a total breakdown in the relationship, e.g., the district has made one or more mistakes and/or parent is angry, perceives district staff lack interest in child, etc.

3. "More is better" (usually parent), i.e., extended school year, more Orton-Gillingham tutoring, more OT/PT, greater integration, more Lovaas discrete trials, nurse (versus trained aide), etc.

4. "The methodology panacea" (can be either a parent or district staff person)--there's only one appropriate approach, e.g., Lovaas vs. TEACCH, Orton-Gillingham vs. any other multi-sensory approach, ASL at state school for the deaf vs. local programming, oral vs. total communication, facilitated communication, total inclusion, etc. The method takes on an almost "religious" aura, i.e., it's a matter of faith regardless of educational foundation, the individual student's needs, etc., almost tantamount to a "cure."

5. Bad professional advice (can be received by either a parent or a district), e.g., no moderately or severely mentally impaired student can be meaningfully integrated, physician identifies student as ADHD, facilitated communication can never work, physician says only nurse (not trained aide) can provide medical intervention, Lovaas-type programming constitutes an illegal aversive therapy, physician prescribes OT/PT from purely medical standpoint and, of course, poor legal advice on what's required under IDEA.

6. "Management amuck"--the parent wants to micro manage implementation of the program and/or the district administratively can't seem to manage it due to lack of skill/expertise/ability to control frustration. The district wants some "professional space."

To address one of these "real" underlying problems may require consideration/use of an ADR option other than mediation at the outset, or an ADR option as the product in whole, or in part, of a traditional mediation process. Other ADR options to address such problems will be discussed further below.

E. Who should participate?–Participation can be actual presence or availability by telephone or otherwise. Either party can request this be discussed and resolved when the mediation is scheduled or when it starts. And, sometimes at the opening of the mediation session many persons will hear the mediator's opening statement to understand the process/ground rules, and thereafter, some persons will be excused and later involved if necessary. Generally, the smaller the number, the better, provided the decision makers and key support people are present for each party (with information providers either there or available). Remember, mediation is voluntary therefore in this regard, as well as all others, either party can object and refuse to participate should they not like the ground rules.

Obviously, a parent must be present. But, a variety of factors can come into play with regard to the desirability/necessity of the other parent being present. For the most part, the parent will control this, but districts might sometimes want to encourage or try to "require" both parents be present.

With regard to districts, critical is that a decision-maker be present (even if recommendations need to be checked with someone else). Among other factors, districts (and parents) should consider which staff have the respect/good relationship with the parents and can effectively communicate, and the needed information regarding the student/programming.

Whether advocates/attorneys participate and how again is up to the parties. Typically, they're not prohibited. But each party should consider whether the presence of the advocate/attorney is desirable under the circumstances, or necessary, and the role they will play in the mediation (e.g., spokesperson, legal consultant, etc.). Consider your attorney's attitude and skills to achieve a settlement (i.e., is he/she litigation oriented in approach? Consider the attitude/reputation/skills of the parent's advocate/attorney with regard to whether the district's attorney need be present (or available by phone)?

Finally, there are other persons who might participate, most notably in some situations the student, other support persons, interpreters, etc. Remember, witnesses and observers are not necessary.

F. The agreement and wrapping it up–An agreement could cover a variety of matters, some special education, some not. Regarding special education matters, it might be best for the agreement to indicate what will happen, an IEP meeting will be called, or the hearing officer will acknowledge/approve the agreement in a decision and conclude the hearing. With regard to non-special education matters, if necessary, consideration might be given to identifying responsibility for implementation, avenues for addressing any noncompliance, etc.

IX. THE TRADITIONAL ALTERNATIVE DISPUTE RESOLUTION OPTION – MEDIATION.

A. Typically, we seem to first consider mediation when looking to resolve a dispute. In some states there are other processes, e.g., conciliation, mini-hearings with advisory opinions, etc.

B. There is no reason why any of the nontraditional options discussed below could not be the product of a structured mediation or other dispute resolution processes. It is just that traditionally the parties, their advocates, and the mediator (or other third party neutral) are usually only looking to solve the current identified problem(s), failing to see or just ignoring a possible "real" underlying problem and the solutions to it.

C. "Traditional" mediators may have difficulty in getting the parties to identify and/or consider addressing the "real" problem. Given the parties have usually talked about many things at some length, this writer prefers a more directive, focused approach to the mediation discussion plus a more active mediator in suggesting possible "real" underlying problems and approaches to address them.

X. FACTORS TO CONSIDER BEFORE PURSUING NONTRADITIONAL DISPUTE RESOLUTION OPTIONS.

A. The key to settling a dispute and therefore to even considering the possibility of utilizing any non-traditional option for both a parent and a district, as well as their advocate/attorney, is one of "attitude." Undeniably, advocates/attorneys can also bring much "baggage" into a situation, e.g., ego, ignorance of the special education process (i.e., need to work together), competition (i.e., wants to "win"), the organizational goals of the advocate, etc., may come into play. In short, the selection of your advocate/attorney may be critical.

B. Special education is not an exact science and in many situations there are a range of programs that are appropriate and not harmful to the student. Is the parent and/or district so sure that the program the parent proposes is not appropriate (or harmful) that it is willing to go through an expensive hearing? Or might it be tried with the progress or lack thereof and problems monitored, documented, etc. (possibly with the prior agreement that if at the end there is a hearing the stay put would be where the student is now)?

C. Is the district all worried about "precedent?" Legally, special education cases are worth little as precedence since they are fact specific to an individual student's needs. Practically, in terms of the parent "grapevine," claims of precedent may arise, but more often than not could, and should, be addressed by the district justifying its different response to differing individual needs (which obviously cannot be totally explained given confidentiality requirements). Plus, parents and their advocacy organizations must do a much better job of educating parents in this regard.

D. The potential for damage suits by parents under IDEA, 504, or otherwise (and claims for reimbursement for attorney fees) must be considered. Are such issues left aside? Can either party demand their waiver or payment as a condition to settling the programmatic issues?

E. Most non-traditional options require some degree of risk taking, e.g, loss of control, very limited, controlled potential harm to the child, being shown a party is wrong, being second-guessed by a supervisor, board, or spouse doing something someone might deem "illegal," trust in a third party, etc.

F. Often, these non-traditional options will require one or both parties to waive certain rights. Both the Office of Special Education Programs (OSEP) and the Office of Civil Rights (OCR) have on occasion ruled that in a variety of situations, certain rights cannot be waived. For example, a district could not require a parent to sign a waiver of liability in order to receive school health services, Berlin Brothers Valley (PA) Sch Dist, EHLR 353:124 (OCR, 1988); a state rule allowing for binding arbitration of an issue going to due process hearing was illegal in allowing for a waiver of the right to appeal, Letter to Batten, EHLR 211:168 (OSEP, 1979); and a party could not waive the failure of a hearing officer to have completed a training program required by state regulation, Bd of Ed of Roosevelt Union Free Sch Dist, 23 IDELR 748 (SEA, NY 1995).

Despite the above rulings, as a matter of common sense, if a criminal with informed consent can waive constitutional rights, why cannot an informed parent and/or district, with a trained advocate/legal counsel, waive rights under IDEA to gain a resolution of their dispute short of an expensive hearing? Many courts have in effect recognized that IDEA rights can be waived. The Third Circuit Court of Appeals in W.B. v Matula, et al, 23 IDELR 411 (3rd Cir, 1995), in reviewing the legality of a settlement agreement under IDEA found that a heightened standard based on the totality of the circumstances should be employed since a parent was waiving a "possible civil right." In order to determine whether the settlement, including a waiver of various rights, was voluntary, deliberate, and informed, the court said the following factors should be considered: whether the language of the agreement was clear and specific; the consideration given in exchange for the waiver exceeded the relief to which the signer was already entitled by law; the signer was represented by counsel; the signer received an adequate explanation of the document; the signer had time to reflect upon it; and, the signer understood its nature and scope. Also to be considered is whether there is any evidence of fraud or undue influence, or whether enforcement of the agreement would be against the public interest.

Any non-traditional option which involves the waiver of rights under IDEA should meet this heightened standard or the district must be willing to accept an increased risk that it may be illegal, enforceable, etc. (which under some circumstances still may be an acceptable risk given the circumstances).

G. A fundamental guiding principle here utilized with regard to considering and developing non-traditional dispute resolution approaches is this: if it is in the best interest of the student (in terms of providing the student with what IDEA would require) and the parent and district agree (after having consulted with an advocate/attorney) don't let the potential view of the Office of Special Education Programs (OSEP) or some other agency that the arrangement is "illegal" (e.g., most notably a parent can never waive IDEA rights) stop you from trying it! Absent the potential loss of federal or state financial aid to the district (which would be very rare in most instances), the adverse consequences if the arrangement were deemed "illegal" would typically be far less worse to both parties than having gone to a hearing in the first place. At worst, you'll probably end up in a hearing!

H. Many options require the appointment or selection of a trusted third party. Networking to be able to identify such persons becomes very important. Next, the "set up" with regard to this person is critical in terms of allowing both the parent and district to "check the person out" with both parents and districts with whom the person has previously worked in terms of their educational knowledge, people skills (with both parents and staff), and objectivity.

XI. OTHER ADR OPTIONS.

A. Facilitation.

1. Facilitation is basically where a neutral third party merely facilitates an IEP or other type of meeting to assist the parties in discussing and hopefully resolving the issues.

2. Amazingly, districts often select a person to "run" an IEP meeting who has no skills to run any type of meeting and/or fails to understand the building blocks of an IEP! Moreover, sometimes the whole environment for an IEP meeting can be changed, merely by appointing or mutually selecting a neutral facilitator to run the meeting.

B. Conciliation.

1. Conciliation is where a neutral third party acts as an intermediary between the parties to informally explore mutually agreeable solutions, typically without meeting with both parties.

2. Something akin to mediation, conciliation has the advantage of allowing a neutral third party to speak with various individuals or groups on each "side" of the dispute at various times, allowing them in between to confer with each other or gather other information, etc. At times, conference calls with both parties or actual meetings might be appropriate. In short, it offers flexibility and the opportunities for more time between conversations that a mediation usually will not.

The disadvantage is that sometimes more time and the failure to have the parties physically present may lessen the subtle "pressure" and immediacy to gain a resolution. And, of course, the going back and forth via telephone calls typically will take a period of time, possibly a couple of weeks where as a mediation session would usually be quicker.

C. Neutral evaluation.

1. This is not an educational evaluation, but rather an evaluation of the case, i.e., the strength and weakness of each party's position, both legally and factually, even possibly to the point of rendering an advisory opinion as to what would happen if the case were actually litigated. The evaluator would obtain information based upon an agreed upon process, typically informal. In some states, this approach is called a "mini hearing" with each side being given a specified period of time in which to present evidence or have the advocate merely state what it is believed would be shown at a hearing. The opinion can be given orally or in writing. The extent of its use should be agreed upon with the parties beforehand, i.e., could it be used in a subsequent hearing. At a minimum it would hopefully lead to settlement, although the parties could even agree that it be binding.

2. Many times parties just want to know whether they have a case or not in the eye of a neutral third party that they respect, i.e., a reality check. Or, a party just might need someone to tell them they have to "do it," i.e., a district for political reasons. This option might also work where the question is a purely legal one, and the parties for whatever reason choose not to use the traditional IDEA complaint procedure. Such might be used as a prelude to mediation where one or both parties receive that just by agreeing to mediation they are letting down their guard a bit regard the firmness of their position.

D. Neutral educational evaluation.

1. Granted, a parent under IDEA can request an independent educational evaluation (IEE) and a district can go outside its own staff to a somewhat independent educational evaluator. But the parties can also mutually agree upon utilizing an independent evaluator regarding various educational issues even before district staff conduct an evaluation (where it is fairly clear the parents will object) provided the parents agree that this IEE will also satisfy their right to an IEE.

2. Key points to consider in this regard are ensuring that the role and responsibilities of this independent educational evaluator are all agreed upon and clearly spelled out, i.e., exactly what questions are do they answer, their information gathering process (being sure to talk with both parties), what use,

if any, can be made of this evaluation in a subsequent ADR option or hearing, who pays (district or insurer), etc.

3. IDEA-97 requires an "assessment plan" (albeit without an IEP meeting under the new regs) regarding how a student with disabilities will be evaluated or reevaluated. The parties should seize upon this assessment plan as an opportunity to discuss and resolve (possibly by the utilization of a neutral educational evaluator or other ADR options) common evaluation disputes, i.e., which district staff person will conduct the evaluation, is a neuropsychological or vision therapy evaluation necessary, should the student be videotaped, should the parents provide access to, and the records of, outside professionals who have evaluated or provided services to the child such as physicians, psychologists, tutors, and should some communication guidelines be established between district staff and such outside evaluators/service providers.

E. Various non-traditional options.

1. Relations consultant–sometimes mutually agreeing upon a third party (often a psychologist or social worker) who will discuss with both parties their relationship problems including suggestions how they might improve it is very beneficial.

2. Trial placements–all too frequently disputes in special education are addressed by battling experts, e.g., methodology disputes, "more is better" disputes, etc. This option is to have a trial in order to determine the student's program based upon the student's performance with preagreed upon goals/objectives, criteria for assessment, stay put, and maybe a prearranged informal process to determine desired adjustments, disputes, etc.

3. Mutually agreed upon "God"–a mutually agreed upon neutral third party (maybe a higher ed educator) reviews everything, talks to everybody, and decides what the student's IEP will be for a given period of time as well any disputes or desired changes to the IEP. At the end of the period of an IEP meeting is held with the third party chairing it and each party then having the right to pursue a hearing.

4. The "ready cop"–this option might be used where the parties have agreed on all current disputes, but recognize given their relationship the likelihood of future disputes is great, i.e., a violation of the agreement, a desired change, etc. A mutually agreed upon third party is given the authority to rule upon such disputes quickly after an informal information gathering process.

5. "Mediation" and informal hearing–the parties can agree upon a mediator/hearing officer and that they, their advocate/attorneys, and necessary witnesses will all be sworn in and sit around the table to discuss the

disputes on the record, i.e., a court reporter/tape-recorder. Both parties waive a more formal hearing. The initial discussion generally and/or in private caucuses would be comparable to a mediation session. But, any unresolved issues would be determined by the hearing officer based on the record of the discussion. If information was received by the mediator/hearing officer off the record in a private caucus, he/she would notify that party that unless the information was put on the record, it would not be considered in the decision. This approach is probably not far from what Congress envisioned hearings would be under IDEA when it created them in 1975!

6. Utilize a less formal hearing process–both parties can waive their right to a formal hearing or any part of it. For example, the parties could agree on any type of information gathering process from having the hearing officer gather the information like a complaint investigator or via an informal round table discussion. Some of the strategies being utilized in handling the "expedited" hearings mandated under IDEA-97 in disciplinary situations might also be considered, e.g., limiting the time that each party has to present its case; requiring that the direct testimony of witnesses be written down prior to the hearing so that the hearing only deals with cross-examination and re-direct, allowing the hearing officer to ask the questions of each witness first, etc.

F. *Note:* At the outset, it was mentioned many ADR options present risks. The non-traditional options present greater risks given both parties are waiving legal rights, they are placing important decisions in the hands of third parties for a period of time, they may give up the right to appeal, etc. But, such risks must be weighed against the alternative usually foreseeable consequences of not resolving the dispute and namely going to hearing.

G. Actual sample agreements of the various non-traditional options noted in paragraph E(1) through (6) above are available upon request. But, **remember** any sample agreement must be adapted to fit the situation at hand and reviewed by advocates/attorneys for each party.

XII. CONCLUSION.

A. Please keep in mind the four myths, i.e., ADR options can be used at times other than after a parent requests a hearing; mediation isn't the only ADR; issues other than special education can go to ADR; and you needn't necessarily "give" to get a resolution in ADR.

B. Life is not without risks. We take them all the time, hopefully with some calculation. Such must be done more than ever before to resolve disputes in special education. The key question always is are the risks presented worth taking given the possible consequences and/or benefits? Good luck!

special education solutions, L.L.C.

2139 COMMONS PARKWAY ♦ OKEMOS, MICHIGAN 48864-3987 ♦ TELEPHONE (517) 381-8909 ♦ FAX (517) 381-8086
e-mail: spedsolutions@msn.com

LYNWOOD "LYN" E. BEEKMAN

INDEPENDENT SERVICE PROVIDER
EDWARD L. BIRCH

SPECIALISTS IN SERVICES TO HELP PEOPLE MOVE FORWARD
MEDIATION ♦ HEARING OFFICER ♦ COMPLAINT INVESTIGATION
♦ TRAININGS AND PRESENTATIONS

MEDIATION PLUS OPTIONS TO RESOLVE THE "REAL" PROBLEMS UNDERLYING DISPUTES

Lyn Beekman
Special Education Solutions
Okemos, MI

SAMPLE AGREEMENTS

Attached are the sample agreements discussed in paragraphs E-1 to E-6 at pp. 14-15 of the outline.

E-1. Relations consultant

E-2. Trial placements

E-3. Mutually agreed upon "God"

E-4. The "ready cop"

E-5. "Mediation" and information hearings

E-6. Utilizing a less formal hearing process

Note: The attached agreements are merely samples. Each must be adapted to fit the circumstances presented by a particular situation.

© 2000 Special Education Solutions, 2139 Commons Parkway, Okemos, MI 48864-3987; Telephone: 517-381-8909; Fax: 517-381-8086; E-mail: spedsolutions@msn.com

ATTACHMENT E-1

SUGGESTED COMMUNICATION GUIDELINES

The following are items, based upon my experience in various situations, which both parties might consider with regard to establishing a framework for them to cooperate in exchanging information relevant to evaluating, planning and educating a student with disabilities:

1. One district staff person be designated as the contact person for the parent as well as any outside individuals or agency involved in providing services to the child. While the district has the right to name the person, hopefully such could be done on the basis of mutual agreement.

2. Have the parent consent to outside persons and agencies involved in evaluating or providing services to the child giving, and receiving, information to the district contact person (i.e., consents will need to be obtained from the parents for information to go both ways).

3. Establish some type of a periodic basis for such information to be exchanged as well as before IEP meetings or around any significant event which might potentially impact the service being provided by the other party (e.g., change in medications, incidents/change in mood at school, etc.).

4. Invite non-district service providers to participate in METs and IEP meetings or any other problem solving meetings which might be held within the district (and the reverse might be appropriate with regard to evaluations/planning meetings conducted by non-district persons/agencies).

5. Establish a joint school/home behavior support program through the district IEP meeting (and if appropriate non-district agency planning procedure) to provide consistency between home and school regarding addressing behavioral problems.

6. In the event medications are to be taken during school (whether administered by the student or by staff) and/or the child's performance in school (academically, behaviorally, or both) may be relevant to the physician administering the medication, establishment of some type of a medication program/approach/information exchange should be considered.

7. The retention of a mutually agreed upon consultant (typically a psychologist) to work with both parties in an attempt to improve their working relationship. I have used an individual who has worked with many districts and has the "approval" of parent advocacy groups. Initially, the consultant speaks with both parties and makes recommendations as to what he/she believes might be beneficial. Thereafter, the nature and extent of the consultant's activities must be mutually agreed upon by the parties. The expense is solely the districts. I have preferred to avoid labeling this as "parent counseling" or "administrative counseling" but depending upon the situation, it may involve a little of both.

© 1999 Special Education Solutions, 2139 Commons Parkway, Okemos, MI 48864-3987, Telephone: (517) 381-8909

ATTACHMENT E-2

STATE OF _____
BOARD OF EDUCATION OF THE _____ SCHOOL DISTRICT

_____

_____,
on behalf of their son/daughter
_____,

Petitioners,

-and-

_____
Hearing Officer

BOARD OF EDUCATION OF THE
_____ SCHOOL DISTRICT,

Respondent.

_____

MEMORANDUM OF AGREEMENT

This agreement is made between the [RO] School District ("School District")[1], and the parents of student, _____, namely, _____ and _____ _____ ("Parents"). The request for a due process hearing was made on _____, 19___, by the Parents relative to their disagreement with the Individualized Education Planning Committee ("IEPC") decision of _____, 19___. The parents' disagreement with the IEPC at issue involves their child's school placement, appropriate programming, and least restrictive environment matters.

A prehearing conference was convened by the Hearing Officer on _____ _____, 19___, at the School Board offices of the School District. The result of that conference is the basis of this Agreement.

All parties agree that:

_____

[1]The RO School District is the district in which the student resides. The OP School District operates the program in which the student will participate.

1. The [OP] School District staff are currently conducting a customary three-year reevaluation of _____. The Parents and their representatives will as soon as possible provide to the [OP] School District those specific items regarding _____'s current performance, needs, or other related matters which they desire be addressed as part of this evaluation. This three-year evaluation is to be completed prior to the commencement of the trial period. As a result of this step and the provisions of paragraph 6 below, the Parents' request for an independent evaluation set forth in a letter to _____ from _____ dated _____, 19___, is fully satisfied; and

2. This "trial period" of education will physically occur at the [OP] High School, [OP] School District, where education personnel currently participate in a program where severely multiply impaired ("SXI") special education students are in a self-contained classroom and mainstreamed into a high school setting; and

3. The program of education will initially be a mix of programs in both special education and regular education settings, (i.e., a portion of the school day in the existing SXI self-contained classroom as well as portions of the day being integrated into general education classes). The "mix" shall be initially established and periodically adjusted by the mutual agreement of the parties in order for the [OP] School District to develop and/or evaluate the maximum extent to which _____ should be appropriately integrated into regular education settings up to and including the entire school day.

In the event the parties cannot agree upon the initial mix or any subsequent adjustments to the mix, the hearing officer shall be immediately notified and an informal conference scheduled with the parties and their representatives. The parties and their representatives shall informally present their relative positions to the hearing officer. The parties and the hearing officer may informally ask questions. The hearing officer, at the close of the conference, or shortly

thereafter, shall decide the appropriate mix considering the purpose of this trial period and confirm such in writing to the parties. Both parties waive all rights which each may have to a more formal due process proceeding and related matters to the extent of the determination of the mix either initially or adjusted; and

4. This "trial period" will begin no later than the start of the 19___-__ school year unless the parties mutually agree otherwise, and will run through at least the first marking period for the fall 19___ semester in the [OP] School District. It is further understood that if the parties mutually agree additional time may be necessary, the trial period shall be extended but it should not exceed the end of the second marking period in the [OP] School District; and

5. Certain of the [RO] High School administrative staff shall become involved in this "trial period" process and other staff and students may do so. This is not intended to be a burden to such individuals, but as an "in-service" towards gaining knowledge about integrative education; and

6. A continuing re-evaluation/assessment of _____ and programming options is to be accomplished as an element of this "trial period." As a part of this process the [OP] School District agrees to reasonably involve (by way of participation in planning and/or problem-solving conferences, observations, or otherwise) and cooperate with such independent evaluator and curriculum development specialists the Parents choose. Should the Parents choose the Developmental Disabilities Institute (DDI), the district will pay costs up to $300 in accordance with a contract between DDI and district, in consultation with Parents. The Parents would bear any costs of DDI in excess of this amount and, should the Parents choose another evaluator/specialist, they shall bear that cost. The continuing reevaluation/assessment shall include _____ being evaluated for the feasibility of an integrated education in a general education environment; and

7. Periodic meetings and discussions between all interested parties will be scheduled in order to monitor the goals, objectives, progress, and events of this "trial period;" and

8. The summer of 19___ educational program will be determined during a meeting of Parents and school officials by _____, 19___. If the parties cannot agree on the program, the hearing officer shall decide the program to be provided utilizing the same type of informal conference set forth in paragraph 3 above; and

9. At or near the close of the trial period, the [RO] School District shall hold an IEPC to determine the appropriate placement for _____. If either the [RO] School District or the Parents disagree with the determination of the IEPC, it/they may request in writing a due process hearing in accordance with special education law and rules. The request shall be directed to the hearing officer within ten (10) days after the IEPC and he shall serve as the hearing officer; and

10. Should either party believe the other has in any way violated the terms of this agreement or special education rules while this trial period is being implemented, they must present such allegations to the hearing officer who shall hear and determine the same utilizing the same type of informal conference set forth in paragraph 3 above. During the trial period, neither party shall file any complaint or commence any alternative proceedings before any other agency regarding _____'s educational programming; and

11. The Parents' prior request for a due process hearing in this matter is held in abeyance in consideration of the arrangements set forth above as well as their right to reactivate their request for a due process hearing should they disagree with the determination of the IEPC at or near the conclusion of the trial period. The hearing officer in this matter shall retain jurisdiction while this agreement is in effect for those purposes noted above. Any request by either party to the hearing

officer to consider any matter or take any action shall be in writing with a copy directed to the opposing party; and

12. Should the Parents reactivate their request for a hearing under item 11 above, the operative placement for the purposes of the "stay put" provision would be at the [OP] High School. The "mix" of the programming shall be mutually agreed upon by the parties given the experience of the trial placement. However, if the parties cannot agree on the mix, the Hearing Officer shall decide the interim placement utilizing the same type of informal conference set forth in paragraph 3 above; and

13. Any §504 (Vocational Rehabilitation Act) complaint/issue which may have arisen to date will not be pursued by the Parents at this time because the basis for their complaint is at this time resolved due to this Memorandum of Agreement. Any 504 complaint/issue which might arise during the course of, or at the end, of this trial period shall be raised by the Parents and submitted to the hearing officer. The hearing on such issues shall be consolidated within a hearing under the special education rules before the hearing officer except that he shall render separate decisions regarding issues arising under 504 and special education rules; and

14. It is understood that the [RO] School District shall not be obligated to pay any of the Parents' attorneys fees or related costs incurred prior to or during the period this agreement is being implemented. However, the Parents reserve all rights under the Handicapped Children's Protection Act of 1986 or otherwise regarding possible claims for attorneys fees and other related costs incurred in connection with any due process hearing held at the close of the trial period; and

15. This agreement shall not be made a part of _____'s educational records although the [RO] and [OP] School Districts shall consider it to be covered by the provisions of the Family Educational Rights and Privacy Act (FERPA) and its regulations.

Each of the undersigned, being parties to this due process hearing request, agree to all of the above and further agree to waive all statutory timelines and notices, while holding the due process hearing in abeyance throughout this "trial period."

_____ Dated:_____

_____

Parent of _____

_____ Dated:_____

_____

Parent of _____

_____ Dated:_____

_____, School District

Representative

ATTACHMENT E-3

STATE OF MICHIGAN

BOARD OF EDUCATION OF THE SCHOOL DISTRICT
OF THE CITY OF _____

_____

_____, on
behalf of their son/daughter _____,

Respondent,

-and-

_____
Hearing Officer

BOARD OF EDUCATION OF THE SCHOOL
DISTRICT OF THE CITY OF _____,

Petitioner.

_____

SETTLEMENT AGREEMENT

This matter has two aspects. First, on March 10, 1993, the parent by letter requesting, among other things, an IEPC be held regarding _____. Second, by the letter dated March 10, 1993, the parents requested an Independent Educational Evaluation (IEE) which the District would deny and initiate a hearing to show its evaluations were appropriate pursuant to 34 CFR 300.503(b).

The parties have mutually agreed to have _____ serve as the hearing officer regarding both aspects of this case.

As a result of the discussions which have taken place, the parties have agreed to the following:

© 2000 Special Education Solutions, LLC, 2139 Commons Parkway, Okemos, MI 48864-3987, Telephone: 517/381-8909; Fax: 517/381-8086; E-Mail: spedsolutions@msn.com

1. The District, at its cost, will retain the services of Dr. _____, Coordinator for Special Education Programs at _____ University, to conduct the following activities as an independent consultant to the parties to resolve the parents' IEE request and the District's request for hearing regarding it. The consultant shall:

a. Review _____'s educational records and only to the extent educationally relevant, his medical records. The parents shall provide the consultant appropriate consents as necessary upon her request.

b. Consult with _____, his parents, any District staff of her choice, and any other person who has evaluated or treated _____, as she deems necessary to gain as complete an understanding as possible of _____'s current educational performance, unique individual needs (including how _____'s ADHD impacts his attention, focusing and retention), and the special education programs and services (including accommodations in general education settings) necessary to meet those needs. The parents shall provide to Dr. _____ appropriate consents as necessary upon her request. Also, all class observations are authorized by the parents and shall be conducted as often as Dr. _____ requests.

c. Conduct such evaluations of _____ as she feels are necessary to determine _____'s problems and needs with respect to any learning disabilities (including, but not limited to, the areas of basic reading skills, reading comprehension, oral expression, listening comprehension, math calculation, and problem solving, written expression, retention, and how _____'s ADHD impacts his learning and communication) and the special education programs and services (including accommodations in general education settings) necessary to meet those needs. The District's MET report of 5/29/91 shall be considered updated and amended to the extent it is inconsistent with Dr. _____'s evaluation. A copy of the report of any evaluation

conducted and possible amendment to the 5/29/91 MET shall be provided to the parents and the District. Thereafter, she shall determine _____'s individual educational needs.

d. Develop in consultation with _____, his parents, their representative, and District staff utilizing whatever process she deems appropriate, _____'s goals and objectives (including criteria by which to evaluate his progress).

e. Determine, in consultation with _____, his parents, their representative, and District staff utilizing whatever process she deems appropriate, the special education programs and services (including accommodations in general education settings) which she finds are necessary to address _____'s needs as a result of his learning disabilities for the 1993-94 (as well as any modifications that she deems appropriate throughout the term of the Settlement Agreement). If in making such determinations she finds it would be appropriate to modify the services for speech and language therapy as provided in the November 11, 1992, IEPC, she may do so with concurrence of the prior independent speech and language specialist.

f. Whenever she deems it appropriate, even before she has completed all the above activities, determine such modification in the special education programs and services as well as accommodations in the general education setting under the 11/11/92 IEPC (attached to the Settlement Agreement), which she finds are appropriate pending her making the determinations under item (e) above.

g. Issue a written report(s) to the parties to advise them of her findings/determinations and the reasons therefore under items c, d, e, and f above. Specifically, the report will include: _____'s present level of educational performance in each area, his current needs, and the special education programs and services, including accommodations in all school settings, those needs require. The parental input and questions shall be reviewed and responded to

by Dr. _____. She will also review and attempt to determine which goals and objectives from the 11/11/92 IEP have been met and/or need to be continued, adjusted, and possibly amended. She will also make recommendations for a transitional plan which will include to the extent she deems appropriate prevoc, academic, and communication prerequisite skills based on the "Michigan Special Education Program Outcomes Guide: Learning Disabilities." For example, this might include basic academics, self-esteem/social integration, personal efficiency and productivity, language and communication, attention issues, and retention/adaption.

2. Both parties agree to act in good faith and cooperate fully with Dr. _____ to assist her in conducting the activities mentioned above. Near or at the completion of her evaluation and related activities, near the end of the 1992-93 school year and at such other times as she deems appropriate, Dr. _____ shall call a meeting of the parties and such other persons she desires to plan, coordinate, or discuss _____'s programs/services and related matters. Further, the parties agree to be bound by and implement the determinations of Dr. _____ regarding _____'s special education programs and services (including accommodations in the general education setting) under items (e) and (f) above. However, Dr. _____ does not have the authority under this Agreement to direct the District to pay for programs or services to be provided by third parties (e.g., a private school). Any desired changes in _____'s programs and services (including accommodations in the general education setting) by either party must be approved by Dr. _____.

Dr. _____'s findings/determinations with regard to _____'s current educational performance, areas of learning disabilities, goals and objectives, programs and services (including accommodations) and other relevant information (including for example who is responsible for working on each goal with _____ and Dr. _____'s desired procedure for

monitoring implementation during the agreement) shall be placed upon the District's IEPC and MET report forms by Dr. _____ (or others at her direction). The parties agree that such shall serve as the IEPC for _____ for the 1993-94 school year subject to such modifications as Dr. _____ determines appropriate.

3. Both parties agree that they shall take no further action in this matter except in accordance with the provisions of this Agreement. The District shall schedule an IEPC near the close of the 1993-94 school year at a time mutually convenient to the parties and Dr. _____, who shall participate. (Neither party may request an IEPC or evaluation before this IEPC.) If either party disagrees with the determinations of the IEPC, the party may request a due process hearing. The request must be postmarked not later than ten days after the IEPC and directed to the opposing party with a copy to the hearing officer. The request shall specify those portions of the IEPC with which the parties disagree and what the party believes should have been the correct determination. All claims under IDEA and Section 504 shall be addressed in such an appeal and determined by the hearing officer. Pending completion of the hearing process, _____ would remain in the program and placement last determined appropriate by Dr. _____ and would allow for implementation in _____'s current school.

4. Should either party believe a modification of _____'s program is necessary or the other party is not cooperating with Dr. _____, violated the terms of this Agreement, federal or state special education laws, or Section 504, the party will present such request/allegation to Dr. _____ who shall informally check on the matter and direct the parties to take whatever action she deems appropriate. Should Dr. _____ desire to seek the assistance/authority of the hearing officer, she may do so. Neither party shall file any complaint concerning such matters with either the _____ Intermediate School District, the Michigan

Department of Education, the Office of Civil Rights of the United States Department of Education, or any other agency.

5. The hearing officer in this matter shall retain jurisdiction for the purposes set forth in this Agreement. Any request by Dr. _____ to the hearing officer to consider any matter or take any action shall be in writing with a copy directed to each of the parties.

6. It is the understanding of the parties that as a result of the terms of this Agreement, including the District's retention of Dr. _____ and its payment for her services, the parents' requests for an independent educational evaluation, compensatory education, tutoring fees, and a private school placement, arising prior to the end of the 1993-94 school year are fully satisfied. Further, all parent claims of alleged violations of IDEA and 504 by the District staff are resolved.

7. The parties have discussed and resolved as part of this Agreement the extent of the District's obligation to reimburse the parents for their attorney's fees and related costs incurred in this matter to the date this Settlement Agreement is signed.

Further, it is understood that from the date this Settlement Agreement is signed forward, the District shall not be obligated to pay any of the parents' attorneys fees and related costs during the period this Agreement is being implemented except those incurred in conjunction with any request by Dr. _____ to have the hearing officer intervene in this matter, or those incurred after and related to an appeal of the IEPC determination allowed under this Agreement.

8. This Agreement shall not be made a part of _____'s educational records. Rather, the findings and determinations of Dr. _____ as placed on the District's customary IEPC form, including the goals and objectives, shall be a part of his educational records as well as his evaluation and other reports being attached to and made a part of the 10/27/92 MET form.

Dated: _____ By_____

_____, Parent

Dated: _____ By_____

_____, Parent

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF _____

Dated: _____ By_____

_____

Director of Special Education

AGREEMENT E-4

STATE OF MICHIGAN
BOARD OF EDUCATION OF THE
_____ COMMUNITY SCHOOLS

_____

_____,
on behalf of their son _____,

Petitioners,

v

Hearing Officer
Vicki Wozniak

BOARD OF EDUCATION OF THE
_____ COMMUNITY
SCHOOLS,

Respondent.

_____

SETTLEMENT AGREEMENT

This Settlement Agreement is made between the _____ Community Schools ("District") and _____ ("parents"), parents of _____.

On May 17, 23, and 30, 1995, an Individual Educational Planning Committee (IEPC) was held concerning _____. The parents disagreed with its determination as well as whether it was conducted in accordance with IDEA's procedural requirements. On June 6, 1995, the parents requested a due process hearing. Ms. Vicki Wozniak was mutually selected to serve as the hearing officer.

© 2000 Special Education Solutions, LLC, 2139 Commons Parkway, Okemos, MI 48864-3987; Telephone: (517) 381-8909; Fax: (517) 381-8086; E-Mail: spedsolutions@msn.com

A series of prehearing telephone conference calls were held by the hearing officer with the parties and their advocates during which, among other things, the issues in dispute and the relative positions of the parties were clarified. As a result of ensuing discussions, the parties have agreed to the following:

1. For the 1995-96 school year, _____'s prior IEP implemented during the latter portion of the 1994-95 school year shall be continued (including completion of the attached transition plan) with the following clarifications or exceptions:

a. The "addendum" is deleted.

b. It will be implemented at one of the District's elementary schools, possibly not _____ Elementary, the specific school not being identifiable at this time. As soon as the school is identified, the parents will be advised in writing.

c. The transition plan shall be completed no later than four weeks after the commencement of the 1995-96 school year.

d. Adult supervision/assistance will be provided during mainstreamed activities to incorporate redirection, modeling, verbal prompting, and on-task behavior to facilitate _____'s goals and objectives. Personal care issues will also be addressed.

e. A Circle of Friends will be established for _____ facilitated by the school social worker.

f. The District shall request of the Oakland ISD, as soon as it can be scheduled, a technology evaluation to determine assistive technology supports. The District shall consult with the parents regarding the reasons for the request.

g. The District shall continue to provide the staff currently serving _____ with training regarding sensory integration and Fragile X upon their request, or at

the direction of their supervisors, and shall provide such training to any new staff serving _____ in the future.

h. In reference to the motor activities mentioned at the bottom of page 2 of the 1994-95 IEPC, either the occupational therapist directly, or the LD teacher on a consultive basis with the occupational therapist, shall provide not less than five minutes per day of sensory integration activities.

2. Should either party believe the other is violating either a provision of this Agreement or _____'s IEP, it shall first address the problem with the opposing party (i.e., the parents will bring it to the attention of the building principal, and if unsatisfied, central administration, and the District shall bring it to the attention of the parents). If there is no satisfactory resolution, the party, or their representative, shall have the right to request that the hearing officer address and rule upon the issue. In doing so, the hearing officer would conduct an informal investigation/hearing, the parties waiving any right to a formal hearing. Other than the minimal requirement of the hearing officer giving both parties the opportunity to advise her of their position, the hearing officer would have the discretion to conduct the informal investigation/hearing as she deemed appropriate, e.g., talking to the parties independently, holding a telephone conference call, holding an in-person conference, etc. She would provide the parties with a written ruling and the reasons for it. Neither party could file any complaint with any other agency concerning such alleged violations during the period of this Agreement.

3. If either party believes there has been a change in circumstances so as to necessitate a change in _____'s IEP, the same process as described in paragraph 2 immediately above would also apply, i.e., the parties would first discuss the matter and if no satisfactory resolution was achieved, either could request that the hearing officer address it. Accordingly, during the period of

this Agreement, rather than either party having the right to request another IEPC if they believed the agreed upon IEP was inappropriate or some additional program and service was needed, the issue would be brought to the hearing officer's attention and she, by the same informal process noted in paragraph 2 above, would decide the matter in writing.

4. Each party on a quarterly basis (i.e., on or about October 31, December 31, February 29, and April 30), shall advise the hearing officer briefly in writing as to how it believes _____'s program is or is not progressing. Based upon those reports, the hearing officer may take such action as she deems appropriate, again addressing any issues which might arise utilizing the same process as described in paragraph 2 above.

5. In an attempt to establish a basis to avoid, and, if necessary, resolve any problems which might arise in the conduct of _____'s three-year evaluation in the spring of 1996, and/or his IEPC for the 1996-97 school year to be held on or about May 1, 1996 (including any transition plan for the 1996-97 school year), either party shall have the right to bring the matter to the attention of the hearing officer. Again, using the same informal process described in paragraph 2 above, she shall decide the issue.

6. The request for hearing currently pending in this matter is withdrawn with the hearing officer retaining jurisdiction for all of those purposes noted above.

7. This Agreement may be modified or otherwise altered, but only by a written document noted as such and signed by both parties.

8. Upon the signing of this Settlement Agreement, it shall be forwarded to the hearing officer who, upon reviewing its terms, may enter a Decision approving its terms, including that she retain jurisdiction.

Dated: _____ _____

_____, Parent

Dated: _____ _____

_____, Parent

_____ COMMUNITY SCHOOLS

Dated: _____ By_____

_____ _____, Director
of Special Education

STATE OF MICHIGAN
BOARD OF EDUCATION OF THE
_____ COMMUNITY SCHOOLS

_____

_____,
on behalf of their son _____,

Petitioners,

v

Hearing Officer
Vicki Wozniak

BOARD OF EDUCATION OF THE
_____ COMMUNITY
SCHOOLS,

Respondent.

_____

DECISION

This hearing officer has read the Settlement Agreement entered into by the parties in this matter dated _____. I approve its terms and retain jurisdiction in this matter as provided in the Agreement, finding that it is in the best interest of _____ for its provisions to be implemented. Further, given the circumstances here present, it is found that the procedures set forth in the Agreement providing that this hearing officer retain jurisdiction are warranted and approved, pursuant to this hearing officer's broad authority under the Individuals with Disabilities Education Act to fashion appropriate relief which will effectuate the purposes underlying IDEA.

Dated: _____

_____
Vicki Wozniak, Hearing Officer

ATTACHMENT E-5

STATE OF MICHIGAN
BOARD OF EDUCATION OF THE _____ PUBLIC SCHOOLS

_____

_____, on behalf of her child
_____,

Petitioner,

v

BOARD OF EDUCATION OF THE
_____ PUBLIC SCHOOLS,

Respondent.

_____

AGREEMENT TO COMBINE
MEDIATION WITH INFORMAL HEARING

This Agreement is between the _____ Public Schools ("District") and _____ ("parent"), on behalf of her child _____.

On _____, 1998, an Individual Educational Planning Committee (IEPC) was held concerning _____. The parent disagreed with its determination and requested a due process hearing. _____ was mutually selected to serve as the hearing officer.

It is the desire of the parties to expedite the resolution of this matter by combining the mediation and hearing processes. Accordingly, the parties agree to the following:

1. Both parties, being represented by advocates, have been fully apprised and know their rights relating to mediation and a due process hearing under the Individuals with Disabilities Education Act (IDEA) and its regulations. However, given their mutual desire to expedite the

resolution of this matter, both parties are willing to waive certain of those rights (e.g., have mediation conducted prior to the start of a hearing, have a more formal hearing including the cross-examination of witnesses, etc.), so as to allow this matter to be conducted in accordance with the following procedures.

2. Within five calendar days after this Agreement is approved by the hearing officer, each party shall provide to the hearing officer a brief written statement of their position, providing a copy to the opposing party.

3. Upon approval of this Agreement by the hearing officer, she shall schedule a date for the mediation/informal hearing that is reasonably convenient to the parties and their advocates. The initial session shall be conducted as if the hearing officer were serving in the role of a mediator. The advocates and resource person/witnesses shall all be present, seated around the table, and sworn in. The discussion during joint mediation sessions shall be transcribed by a court reporter. Discussions which the hearing officer as mediator has in private caucuses shall not be transcribed. As in traditional mediation, disputed issues shall be identified, discussed, and hopefully resolved. To the extent resolved, such shall be specifically noted on the record. However, to the extent any disputed issue is not resolved, the prior discussion as transcribed shall serve as the record upon which the hearing officer shall base her decision except that either party may informally place additional evidence on the record after the mediation session is concluded through the submission of documents or asking other persons around the table questions informally.

If either party in private caucuses during the mediation session advise the hearing officer of information or other facts which did not later become a part of the record, the parties acknowledge and understand that the hearing officer shall not consider such facts/information in making her decision. If the hearing officer believes such facts/information are necessary or have significant

relevance in making the decision, she shall in private caucus advise the party who disclosed the fact/information and seek that party's permission to have her or the party place it on the record. Absent such fact/information being placed on the record (in order that the opposing party has an opportunity to be aware of it and possibly respond) as noted above, the fact/information shall not be considered by the hearing officer in rendering a decision. Should any procedural matters arise which the parties have not anticipated, the hearing officer is authorized to resolve them in a manner which is fair to both parties and in keeping with the underlying purpose of this Agreement.

4. If some unresolved matters must be determined by the hearing officer, at the close of the hearing session, each party may verbally or in writing provide to the hearing officer, if desired, a closing statement. The hearing officer shall render a decision within ten days after the submission of such statements, the decision to be consistent with all the requirements of IDEA. Both parties retain the right to appeal that decision as provided by law. Under this Agreement, the hearing officer retains all those rights and responsibilities which any hearing officer would have under IDEA, the parties only waiving, as noted above, their rights to have the mediation and hearing processes separate and have the hearing conducted more formally, e.g., cross-examine witnesses, etc.

5. Upon the signing of this Agreement it shall be forwarded to the hearing officer who, upon reviewing its terms, may enter an order approving it.

Dated: _____ _____

_____, Parent of _____

_____ PUBLIC SCHOOLS

Dated: _____ By_____

_____, Director of Special Education

ATTACHMENT E-6

STATE OF MICHIGAN
BOARD OF EDUCATION OF THE
_____ PUBLIC SCHOOLS

_____

_____, on behalf of her son
_____,

Petitioner,

v

Elizabeth Berman, Ph.D.
Hearing Officer

BOARD OF EDUCATION OF THE
_____ PUBLIC SCHOOLS,

Respondent.

_____

AGREEMENT TO MODIFY
HEARING PROCEDURE

This Agreement is between the _____ Public Schools ("District") and _____ ("parent"), on behalf of her son _____.

On June 6, 1995, an Individual Educational Planning Committee (IEPC) was held concerning _____. The parent disagreed with its determination and requested a due process hearing. Dr. Elizabeth Berman was mutually selected to serve as the hearing officer.

Due to the illness of the District's counsel, the hearing dates originally scheduled in this matter had to be canceled. Make-up dates, given the schedules of all parties and the hearing officer, extend into late November 1995. It is the desire of all parties and the hearing officer to expedite the resolution of this matter, particularly for _____'s benefit. Accordingly, the parties agree to the following:

1. Both parties, being represented by legal counsel, have been fully apprised and know their rights relating to how this due process hearing must be conducted under the Individuals

with Disabilities Education Act (IDEA), Michigan's Mandatory Special Education Act, and their respective regulations. However, given their desire to expedite the resolution of this matter, both parties are willing to waive certain of those rights (e.g., confront and cross-examine witnesses, have evidence submitted by the opposing party only in the other party's presence, etc.) so as to allow the gathering of evidence by the hearing officer in accordance with the procedures set forth below.

2. Within three school days after this Agreement is approved by the hearing officer, each party shall provide to the hearing officer a brief written statement of their position, providing a copy to the opposing party.

3. Upon approval of this Agreement by the hearing officer, she may, at her convenience and each party, schedule such meeting(s) with the party, the party's legal counsel, if desired, and such witnesses as the party desires, in order to receive evidence in support of that party's position and to rebut the opposing party's position. Testimony shall be taken under oath, but can be received from witnesses individually or in groups at the discretion of the hearing officer. While each party, or their legal counsel, may propose certain lines of inquiry with each witness, the focus and extent of the inquiry with regard to what is relevant and necessary for her to decide the issue in dispute, shall be within the discretion of the hearing officer. The order in which evidence is taken, whether additional testimony is needed from a party's witnesses by way of response or clarification to that party or the other party's evidence, or whether there is a need for documents or witnesses not called by either party, shall be at the discretion of the hearing officer. The hearing officer may take testimony in person or by a telephone conference call at her discretion. Should any procedural matters arise which the parties have not anticipated, the hearing officer is authorized to resolve them in a manner which is fair to both parties and in keeping with the purpose underlying this Agreement.

4. Each party shall have the right to request the hearing officer to observe _____ _____ in the school setting and utilizing facilitated communication with such persons as the party desires. The opposing party shall have notice of any observation of _____ utilizing facilitated communication and may be present, if desired.

5. A court reporter, paid for by the District, shall make a record of all testimony provided to the hearing officer.

6. The parties have already exchanged proposed exhibit and witness lists. But, each may make changes to either of those lists (including proposed exhibits). Any changes shall be exchanged in writing at the time opening statements are exchanged as noted above.

7. At the close of the evidence, each party may verbally or in writing provide to the hearing officer, if desired, a closing statement, the hearing officer establishing when such will be provided.

8. The hearing officer shall render a decision in this matter as soon as reasonably possible after the close of evidence, such decision to be consistent with all the requirements of IDEA. Both parties retain the right to appeal that decision as provided by law.

9. Upon the signing of this Agreement it shall be forwarded to the hearing officer who, upon reviewing its terms, may enter an order approving its terms.

Dated: _____ _____

_____, Parent of _____

_____ PUBLIC SCHOOLS

Dated: _____ By_____

_____, Director of Special Education